M'Guire (7)). All persons dealing with the servant are entitled to assume, unless they have notice to the contrary, that he possesses the authority which it is usual for a servant in his position to possess (*Watteau* v. *Fenwick* (8)).

The "ostensible authority" or holding-out principle is in reality a species of estoppel whereby, even though there is in fact no contract between the principal and the third party suing him, the principal is precluded from contending as against the third party that the agent contracted without his authority. A notional contract is thus implied in law as between the principal through his agent and the third party in order to fix the principal with liability. If the third party knows that the agent is contracting on his own behalf and not on behalf of his principal, no such notional contract can or will be implied (*Daun* v. *Simmins* (9)).

In the present case the evidence is that each salesman is informed, and he knows, that the shop manager is employing him on his own behalf and not acting as a servant or agent of the company. Therefore no notional contract can be implied as between the company and the salesmen. To my mind, the employment by a servant of another servant for his master cannot be regarded as something which falls within the apparent scope of the servant's authority. The apparent scope of the shop manager's authority is to sell footwear for his principal or master, the company. Therefore any contract which he makes for the sale of such footwear with a third party would be within the apparent scope of his authority, as distinguished from any contract with a third party to help him in the sale of footwear, which cannot be said to be a contract within his apparent scope of authority. Again, if the shop manager enters into a contract with a third party for the decoration of his shop for a Christmas sale, the third party is entitled to assume that this is a contract which the shop manager is making on behalf of his principal within the scope of his general authority even though it may be that he is forbidden by his principal to enter into any such contract.

Notwithstanding the fact that the shop manager may be regarded as the agent of the company for diverse purposes under the terms of his employment under the written agreement, he cannot be regarded as an agent of the company for all purposes. In the light of all the evidence in this case, he cannot be said to be acting as an agent of the company when he recruits his own salesmen to assist him. The work which such salesmen do is undoubtedly an integral part of the plaintiff's business but that fact alone, in the absence of the basic *indicia* of the relationship of master and servant, is insufficient to make them the servants of the company. Moreover, their work may equally be said to be an integral part of the shop manager's business in the sense that he has certain proprietary rights in the money realized by the sale of the goods in the shop.

For the reasons I have stated and on the facts of this case I have come to the conclusion that there is no relationship of employer and employee within the meaning of the Employees Provident Fund Ordinance, 1951 between the plaintiff company and the salesmen employed by its shop managers. It is to be observed that section 2 of the Employees Provident Fund Ordinance, 1951 defines an employer to include the manager, agent or person responsible for the payment of salaries or wages to an employee. I think on the basis of that definition alone the plaintiff is entitled to the declaration asked for. There will therefore be a declaration accordingly. I will also make the consequential orders asked for, although the evidence is that the amount which the plaintiff has been called upon to pay is known so that it is merely a question of the plaintiff getting back that money with a reasonable rate of interest thereon which I fix at 4½ per cent per annum. The defendant must pay the costs of the action.

Order accordingly.

Solicitors: *Shearn, Delamore & Co.; Shook Lin & Bok.*

TAN CHONG AND SONS MOTOR COMPANY LTD. v. YANG CHIN LANG

[O.C.J. (Gill J.) September 30, 1966]

[K.L. — Civil Suit No. 939 of 1965]

Contract — Guarantee — Contradiction — Admissibility of oral evidence — Evidence Ordinance, 1950, s. 92 Provisoes (b) and (f).

In this case the plaintiffs sued the defendant on a letter of guarantee. The facts were that one Yang Pin Joo was appointed the agent and authorized dealer of the plaintiffs, who were the sole distributors of certain Japanese cars. Credit facilities were given to Yang Pin Joo but he became heavily indebted to the plaintiffs. The plaintiffs threatened to cancel his agency and to sue him to recover the debts unless he found a guarantor. Yang Pin Joo then spoke to his father the defendant and the father agreed to guarantee Yang Pin Joo's account to the extent of $100,000. Later the defendant signed a letter of guarantee and it was on this that he was sued, as Yang Pin Joo failed to clear his debts. Evidence was given at the trial of the threat to cancel the agency and to sue. It was contended for the defendant that such evidence was inadmissible as no evidence could be given to add to, contradict or vary the contents of the letter of guarantee.

Held: (1) when there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given when such agreement is not inconsistent with or does not contradict the terms of the document and the evidence was admissible under provisoes (b) and (f) to section 92 of the Evidence Ordinance, 1950;

(2) in this case the defendant was liable on the guarantee to pay the amount for which Yang Pin Joo was indebted to the plaintiffs up to the extent of $100,000.

Cases referred to:—

(1) *Clifford* v. *Turrell* (1845), 14 L.J. Ch. 390, 397.

(2) *Frith* v. *Frith* [1906] A.C. 254.

(3) *Turner* v. *Forwood* [1951] 1 All E.R. 746.

(4) *Lloyd's* v. *Harper* (1880), 16 Ch. D. 290, 303.

(5) *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1958] M.L.J. 35, C.A.

CIVIL SUIT.

Eugene Lye (*Palasuntharam* with him) for the plaintiffs.

N. A. Marjoribanks (*A. D. Rajah* with him) for the defendant.

Cur. Adv. Vult.

Gill J.: The plaintiffs are the sole distributors of the Japanese cars "Nissan" and "Datsun" for Malaya and Singapore. In November, 1962 they appointed the defendant's son named Yang Pin Joo as an authorized dealer for such cars for Penang and Butterworth where he carried on business under the style of Summit Motors. To begin with, the plaintiffs allowed Yang Pin Joo credit facilities to the extent of $26,000 on the understanding that payment for all cars supplied to him was to be made within two months. Such credit facilities were extended to $52,000 in July, 1963.

By November, 1963 Yang Pin Joo had greatly exceeded the limit of his credit facilities and he owed the plaintiffs about $123,000. The plaintiffs became anxious and sent two of their representatives to Penang to discuss matters with him. After the return of their representatives from Penang the plaintiffs wrote to Yang Pin Joo their letter dated 22nd November, 1963 in which they mentioned the suggestion which had been made in the course of the discussions about the possibility of their increasing the credit facilities to $150,000 and the period of payment to three months, provided such credit facilities were guaranteed by his father's company.

By their letter dated 27th January, 1964 the plaintiffs increased the credit facilities of Yang Pin Joo to $100,000. On 19th February, 1964 the defendant provided a guarantee in the form of a letter addressed to the plaintiffs in the following terms:—

"In consideration of your granting credit facilities to Mr. Yang Pin Joo, Sole Proprietor of M/S Summit Motor Co., Ltd. of 3917, Bagan Luar Road, Butterworth, Province Wellesley, I, the undersigned, Yang Chin Lang of 20, Jalan Raja Bot, Klang, Selangor, hereby guarantee the performance and fulfilment by the said Yang Pin Joo of any obligation and liabilities due from him to you on the understanding that:—

(a) The maximum credit balance monthly shall not exceed $100,000 (dollars one hundred thousand only).

(b) Settlement of all vehicles sold by him within 75 days after purchase by him.

(c) In the event of his failure to settle you within 75 days after his purchase of your vehicles, you shall have first right to collect from the hirers of said vehicles outstanding dues in respect of said vehicles sold to them and to take over within twenty-four hours all his assets to offset any balance owing to you and it is further expressly agreed that I will indemnify you for any balance still owing you after all the collections from all hirers of said vehicles and the realisation of his assets have been taken into account."

After 19th February, 1964 the plaintiffs continued to supply cars to Yang Pin Joo, who made payments from time to time but his debts kept on increasing. By August 1964 he was indebted to the extent of $159,311. Thereafter the amounts owing by him were brought down month by month, but he was still owing the plaintiffs a sum of $109,128.37 in January 1965. On 28th November, 1964 the plaintiffs had written to the defendant demanding payment of the sum of $100,000 as guaranteed by him, but there had been no reply from the defendant. Subsequently, the plaintiffs brought an action in this court in Civil Suit No. 262 of 1965 against Yang Pin Joo and obtained judgment against him in the sum of $109,128.37 on 22nd April, 1965.

The judgment against Yang Pin Joo not having been satisfied, the plaintiffs have brought this action against the defendant to recover from him the sum of $100,000 which they claim he is liable to pay under the guarantee provided by him.

The facts of the case as regards Yang Pin Joo's indebtedness are not in dispute. It is also not in dispute that his debts kept on increasing beyond the limit of the credit facilities granted to him, that the plaintiffs wrote numerous letters and made telephone calls requesting him to pay and that he on 21st January, 1964 wrote to ask the plaintiffs to stop their people from making phone calls and to give him time to settle his bills.

The real dispute on the facts is with regard to the circumstances which led to the signing of the letter of guarantee by the defendant. The evidence of Tan Yuet Foh (P.W.1) and Yeow Eu Leong (P.W.2), the managing director and manager respectively of the plaintiff company, is that when they saw Yang Pin Joo in Penang they told him that as his debts had increased to a large amount, he should get his father to guarantee payment, failing which they would cancel his agency as authorized dealer and take legal action to recover the money. They have further testified that some time later the defendant came to see them in their office, and they told him how much his son owed and that they

were going to sue him. The defendant asked them to give his son further credit and not to sue, as he would guarantee payment. No document was signed on that day, but there was an understanding that the defendant would stand guarantee up to a sum of $100,000. In the third or fourth week of January, 1964 Yang Pin Joo informed them that he would take his father to their office to sign a letter of guarantee. The father and son came to their office on 19th February, 1964 and the defendant signed the letter of guarantee which he had brought with him.

The defendant's story is that the first time his son talked to him about providing a guarantee was on the night of 18th February, 1964. His son told him that he was already indebted to the plaintiffs for more than $100,000 and that the plaintiffs were prepared to grant further credit for another $100,000 for which they required a guarantee. He repeated to P.W.1 and P.W.2 what his son had told him, after which he signed the letter of guarantee. He had never had any discussions with P.W.1 and P.W.2 or either of them or any member of the plaintiff company prior to the date of his signing the letter of guarantee.

Yang Pin Joo has given evidence for the defendant to say that when P.W.1 visited him in November 1963 in Penang nothing was said about cancelling his agency or suing him, but there was discussion about his having exceeded the credit facilities of $52,000. There was a suggestion about his finding a guarantor for increased credit facilities, but no amount was mentioned. He had a meeting with P.W.1 and P.W.2 in January 1964 as a result of which they allowed him credit facilities up to $100,000. The first time he asked his father to provide a guarantee was on 18th February, 1964 and this guarantee was for a credit of $100,000 over and above the credit facilities which had already been granted to him without a guarantee.

Having considered the evidence for both sides, I have very little hesitation in rejecting the evidence of Yang Pin Joo that P.W.1 and P.W.2 did not threaten to cancel his agency and sue him unless he provided a guarantee. I also reject his evidence and the evidence of his father that nothing was said to the father about the proposed guarantee until 18th February, 1964. I cannot accept the evidence of Yang Pin Joo that there was no arrangement as to how he was to pay off the credit facilities granted to him without a guarantee. It is clear from the evidence and the correspondence which passed between the parties that the guarantee which the plaintiffs were looking for was a guarantee in respect of the running account of Yang Pin Joo as a result of his dealings with the plaintiffs. He has admitted that his financial position at about that time was bad and that he informed his father about it. In the circumstances it is inconceivable that the plaintiffs would ask him to provide a guarantee for his future credits and take no steps in respect of his past credits which exceeded $100,000. The truth of the matter lies in the evidence of the plaintiffs' witnesses, because if they suggested to Yang Pin Joo that he should find a guarantor, which is not denied, they would quite logically have held out or hinted at some sort of threat to cancel his agency and sue him to recover their debts if no guarantee was provided.

It was contended on behalf of the defendant that the evidence of the plaintiffs' witnesses with regard to their threat to cancel the agency and to sue was inadmissible, as no evidence could be given to add to, contradict or vary the contents of the letter of guarantee. In my opinion, this evidence was admissible because, as was stated by Lord Lyndhurst L.C. in *Clifford* v. *Turrell,*[1] "the settled rule of law is, that you may prove a further consideration which is consistent with the consideration stated on the face of the deed. You cannot be allowed to prove a consideration inconsistent with it, but you may prove another which stands with it." That case was approved by the Judicial Committee of the Privy Council in *Frith* v. *Frith.*[2] In *Turner* v. *Forwood* [3] it was held that where the consideration is stated in a deed, parole evidence to prove a larger consideration does not contradict the deed and is admissible. In my opinion, the evidence was admissible under provisoes (b) and (f) to section 92 of the Evidence Ordinance, 1950. Quite clearly when there is a contemporaneous or prior separate oral agreement as to a matter on which a document is silent, proof of it may be given when such agreement is not inconsistent with or does not contradict the terms of the document.

The issue between the parties depends on the construction to be placed upon the words of the guarantee. The principle to be followed in construing a document of this kind, as stated by Fry J. in *Lloyd's* v. *Harper* [4] is that, "a guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances." From the evidence produced it is abundantly clear what the surrounding circumstances relating to the guarantee were. Yang Pin Joo was heavily indebted to the plaintiffs. The plaintiffs threatened to cancel his agency and to sue him to recover the debts unless he found a guarantor. He spoke to his father and the father orally agreed to guarantee Yang Pin Joo's account to the extent of $100,000. In consequence of that guarantee the plaintiffs wrote to Yang Pin Joo their letter dated 27th January, 1964 that they had increased his credit

facilities to $100,000 and asked him to pay off his debts in excess of $100,000. Subsequently the defendant went with a letter of guarantee to the plaintiffs' office and there signed it. Those are my findings of facts as to the surrounding circumstances and, to my mind, they are sufficiently borne out by the evidence.

It has been contended on behalf of the defendant that he is not liable because the conditions attached to the guarantee were not complied with. It has been suggested that the guarantee is void *ab initio* because the credit balance (which in effect meant the debit balance) of Yang Pin Joo on the date of the guarantee was $129,518.40 in contravention of condition (a) of the guarantee. I do not agree. It is clear from the evidence in what manner the language of the guarantee was related to the existing facts, namely, that the defendant's guarantee was to extend up to $100,000 irrespective of Yang Pin Joo's monthly debit balance. Condition (a) of the guarantee, therefore, meant nothing more than that the defendant's liability under the guarantee was limited to $100,000, which is the amount for which he has been sued.

It has been further contended on behalf of the defendant that conditions (b) and (c) of the guarantee have not been complied with by the plaintiffs. The principle relied upon here is that, if a party agrees to become surety in consideration of something to be done by the creditor, and the creditor omits to do what was agreed to be done by him, the surety is discharged. To my mind, this rule has no application here. Clause (b) speaks of "settlement of all vehicles sold by Yang Pin Joo within 75 days after purchase by him." This merely states what was required of the principal debtor and not the creditors. All that the creditors could do was to keep on pressing their principal debtor for payment, which they did from time to time. The only other alternative for them was to sue, which they ultimately did, after calling upon the defendant to pay under the terms of his guarantee

It has been argued that clause (c) cast a duty on the plaintiffs to insist on Yang Pin Joo selling the cars on hire purchase because it was on that basis that the defendant gave his guarantee. In my opinion, clause (c) admits of no such construction. In any event, I do not see how the plaintiffs could have taken any action against the hirers of vehicles from Yang Pin Joo as they would not be a party to any such hiring. I also fail to see how the plaintiffs could have taken over within 24 hours all the assets of Yang Pin Joo without a court action. All that the plaintiffs could do was to give Yang Pin Joo credit for whatever they received from him. Some items in respect of which they allowed such credit are mentioned in the plaintiffs' letter dated 28th November, 1964 addressed to the defendant. There is also evidence that after obtaining judgment against Yang Pin Joo the plaintiffs took steps to recover from him whatever they could and were then obliged to take bankruptcy proceedings.

It is clear from the evidence that there was never at any time any question of a new account being opened between Yang Pin Joo and the plaintiffs. His old account was to continue its currency and in fact it was so continued. No separate arrangement was made for the settlement of the old debt. The intention of the parties was that the defendant was to guarantee a continuing account. It is to be observed that the letter of guarantee was headed "Guarantee for credit facilities granted to Mr. Yang Pin Joo."

The facts of this case and the circumstances under which the letter of guarantee was given are not very different from those in the case of *Oriental Bank of Malaya Ltd.* v. *N. Subramaniam*,[5] that being a case of a guarantee in respect of a bank overdraft and this being a case of a guarantee in respect of an existing debit balance of a running account on account of goods supplied.

For the reasons I have stated, the defendant is clearly liable to pay the plaintiffs the amount mentioned in the guarantee furnished by him. There will therefore be judgment for the plaintiffs for $100,000 with interest thereon as prayed and costs.

Judgment for the plaintiffs.

Solicitors: *V. K. Palasuntharam; Lovelace & Hastings.*

MAHINDER SINGH v. PUBLIC PROSECUTOR

[F.C. (Barakbah L.P., Pike C.J. (Borneo) and Ong Hock Thye F.J.) October 3, 1966]

[K.L. — Federal Court Criminal Appeal No. X22 of 1965]

Penal Code, s. 326 — Voluntarily causing grievous hurt — Conviction by trial judge — Contradictions in evidence of complainant — Conviction set aside.

The appellant had been convicted on a charge of voluntarily causing grievous hurt with a spear. The trial judge considered that the evdience of the complainant as regards his ability to identify the assailant was completely unshaken and he found the appellant guilty. In cross-examination the complainant had given contradictory answers as to the identity of the assailant and the weapon used.

Held: the learned trial judge should have taken into consideration the answers of the complainant elicited in cross-examination and in the circumstances of the case and in view of the contradictions in the evidence of the complainant the conviction must be set aside.